IN THE

Supreme Court of the United States

OCTOBER TERM—1943.

DAVID LOWENSTEIN,
Petitioner,

AGAINST

UNITED STATES OF AMERICA,
Respondent.

No.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.—Opinions of the Court Below.

There was no opinion rendered by the Trial Court relating to the within petitioner. The opinions of the Circuit Court below (R. 898-918) rendered May 28, 1943 are still unreported. The *per curiam* opinion of the Circuit Court granting the motion for reargument with respect to the defendant Rudy has not as yet been officially reported but appears in the record (R. 932).

II.—Grounds Upon Which the Jurisdiction of This Court Is Invoked.

A. The United States Circuit Court of Appeals for the Second Circuit made its order for mandate herein on August 3, 1943 (R. 933).

B. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. Code, Section 347 sub-division a (Judicial Code, Section 240a as amended) and Rule 38 of Revised Rules, 1939, of the Supreme Court of the United States.

C. The Circuit Court affirmed a conviction and judgment of sentence of imprisonment in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States. The jurisdiction of this Court is invoked pursuant to said Fifth Amendment to the Constitution of the United States.

D. The reasons stated in the preceding petition, under III (pp. 3 to 5), herewith adopted and made a part of this brief, are believed to constitute good grounds for invoking the jurisdiction of this Court.

III.—Statement of the Case.

A statement of the case has been made in the preceding petition under I (pp. 1-3) which is hereby adopted and made a part of this brief.

IV.—Specifications of Errors.

A. The Circuit Court erred in holding that there was no fatal variance between the conspiracy charged in the indictment and the proof offered on trial (R. 902-904).

B. The Circuit Court erred in holding that the Trial Court's concededly obscure charge and its refusal to accept requests to charge did not prejudice the substantial rights of the petitioner but that such error is presumed harmless (R. 904-906).

C. The Circuit Court erred in permitting the Government to use on appeal a different theory from the

one on which the case was tried in the Court below, to wit: The substitution of the theory that the petitioner had conspired to violate Section 2551a of the Internal Revenue Code in place of what appeared to be the original theory (R. 900-901), that the petitioner had conspired to circulate lead wash in an attempt to divert opium which was to be sold in the underworld. The Circuit Court erred in holding that the conduct of the Trial Judge and the remarks of the United States Attorney were not prejudicial to the rights of petitioner (R. 904-905).

D. The Circuit Court erred in holding that mere suspicion of the unlawfulness of the use to which the lead wash might be put was sufficient ground for sustaining the petitioner's conviction.

Summary of the Argument.

A. Prejudicial variance existed between the single conspiracy charged in the indictment and the crimes established by the evidence. Application of the rule in *Berger* v. *U. S.*, 295 U. S. 78 (1935) required the granting of petitioner's motion made in the trial court to dismiss the indictment, to acquit the petitioner and to set aside the verdict.

B. Petitioner has the right to take advantage of Chapter 28, U. S. C. A., Section 391. The Trial Judge's charge was admittedly obscure and unenlightening and was prejudicial to the substantial rights of the petitioner. The Trial Court's erroneous refusal to accept requests to charge was prejudicial to the substantial rights of the petitioner. That all of these errors on the part of the Court cannot be presumed harmless.

C. It is a universally accepted rule of law that a case may not be tried on one theory in the Court below and

on another theory in an Appellate Court. The protection afforded a defendant in a criminal proceeding by the Due Process Clause of the Fifth Amendment to the Constitution was violated by the trial judge's persistent and prejudicial conduct throughout the course of the trial and the United States Attorney's comment on the failure of the petitioner to call character witnesses.

D. One who sells a preparation suspecting that it may be used for an unlawful purpose, but not knowing of a conspiracy to commit a crime, is not chargeable as a co-conspirator. Application of the rule in *U. S.* v. *Falcone,* 311 U. S. 205, required the granting of petitioner's motion to dismiss the indictment, to acquit the petitioner, and to set aside the verdict respectively made in the Trial Court.

ARGUMENT.

I.

Prejudicial variance existed between the single conspiracy charged in the indictment and the crimes established by the evidence.

Application of the rule stated in *Berger* v. *U. S.,* 295 U. S. 78 (1935) required the granting of petitioner's motions at the trial based on such variance. The Circuit Court in its opinion (R. 900, 902) held that, contrary to the all embracing indictment, the following three conspiracies were revealed by the evidence at the trial: (1) the attempted synthesis of morphine; (2) the attempted extraction of the narcotic base from preparations of limited narcotic content; and (3) the attempted diversion of opium by a circuitous circulation of lead and opium wash.

The first conspiracy concededly was not illegal (R. 900). Both the trial court and the Circuit Court admit-

ted that there was nothing illegal in an attempt to synthesize morphine out of harmless drugs (R. 800, 900). The second conspiracy was admitted by the Circuit Court to have been abandoned (R. 900). The third conspiracy was never proved (R. 900-901).

The Supreme Court has indicated in the *Berger* case that a variance is fatal only if prejudice be established. In the instant case the trial court admitted evidence in proof of the first conspiracy which was concededly a perfectly legal enterprise and with which it is conceded petitioner had no connection. The court also admitted evidence in proof of the second conspiracy with which likewise it was conceded that the petitioner had no connection. The admission of such evidence undoubtedly prejudiced the jury because of the volume of testimony admitted in proof of its purportedly illegal nature (R. 29-240) and because it charged the atmosphere of the court with its spectacular quality. This not only predisposed the jury unfavorably to the petitioner, but served to convince them of his criminal conduct, especially when coupled with the evidence adduced in connection with the third conspiracy. Taken cumulatively, all this testimony, constituting about one-third of the trial, served to completely submerge the jury and would have persuaded any jury of the guilt of petitioner. This may not have been true had he been tried separately upon the third conspiracy, the only conspiracy, if any, with which he could have been even remotely connected.

The prejudicial nature of the variance should be considered, together with the length of the trial, the numerous transactions covered, and the number of defendants. The general character of evidence adduced, the highly inflammatory nature of the testimony against the other defendants, the jumble of names, places, and dates, all contributed to the prejudice of petitioner's trial. Motions

made in the trial court based on the variance between proof offered and that charged in the indictment should have been granted.

II.

The trial court's concededly obscure charge and its erroneous refusal to accept requests to charge were substantially prejudicial to the rights of petitioner and cannot be assumed to be harmless error.

The Circuit Court, both in the majority and dissenting opinions, concedes that the charge was in all respects obscure and unenlightening; that it did not advise the Jury of the issues they were to decide and that the wilderness of the trial court's resulting verbiage must have left the Jury pretty much in the dark (R. 905). Despite its admission of the inadequacies of the charge, the Circuit Court proceeded to dispose of this obvious error by reasoning that the modern disposition seems to assume that an error has been harmless (R. 906). This is opposed to the trend initiated by the Supreme Court in the case of *McCandless* v. *U. S.*, 298 U. S. 342, 347-348 and followed by the Eighth Circuit in the case of *Fort Dodge Hotel Co.* v. *Bartelt,* 119 Fed. 2nd 253, 259. The Circuit Court did not decide this question on the ground that the petitioner failed to take exception to the trial court's charge, but apparently conceded that the petitioner had the right, under Chapter 28, U. S. C. A., Section 391, to take advantage of such error for the first time on appeal.

The Circuit Court's disposition of this question, therefore, rests solely on the ground that such error will be assumed to be harmless. The Circuit Court's refusal to follow the trend now clearly delineated in the *McCandless* case, *supra,* in *Bruno* v. *U. S.*, 308 U. S. 287, 294, and followed by the Eighth Circuit in *Fort Dodge Hotel Co.*

v. *Bartelt, supra,* has resulted in a decision in conflict with the decision of another Circuit Court on the same question and in apparent violation of the rule laid down by the Supreme Court.

Mr. Justice Frank in the dissenting opinion was in vehement disagreement with the subjective conclusions of the majority that this error was harmless (R. 917-918).

The same reasoning holds with respect to the trial court's refusal to accept requests to charge.

III.

The petitioner was deprived of his liberty without due process of law by

A. The Government's use on appeal of a different theory from the one on which the case was tried in the court below.

B. The Trial Judge's conduct throughout the course of the trial and the United States Attorney's prejudicial comments.

A. *The Government's use on appeal of a different theory from the one on which the case was tried in the court below.*

That a case may not be tried on one theory in the Court below and on another theory in an Appellate Court is a principle of law so fundamental and so universal that no citation of authority is necessary.

The Circuit Court decided that three separate conspiracies were shown to have existed rather than the single conspiracy alleged in the indictment (R. 900-901). The Circuit Court in the majority opinion conceded that the Government failed to prove that the petitioner was

engaged in circulating lead wash according to a preconceived plan by which he attempted to divert quantities of opium to be sold in the underworld (R. 900-901). The opinion went on to state however, that the Government was not *now* seeking to maintain the conviction on that theory, but that the Government was asserting on appeal that it had proved a conspiracy to violate the regulations governing the sale of preparations of limited narcotic content, Section 2551a, Title 26, U. S. Code (R. 901).

A reading of the indictment, however, fails to show precisely which of the allegations pertains to which of the conspiracies. It is difficult to determine which Sections of the Internal Revenue Code were being violated by which of the conspiracies. Moreover, the United States Attorney in his opening remarks stated that the Government would prove that the petitioner was engaged in illicitly circulating lead wash in order to divert opium which was to be illegally sold. Despite this statement by the United States Attorney of the government's theory of action with respect to the lead wash conspiracy, and despite the fact that it decided that there were three separate conspiracies, the Circuit Court of Appeals, nevertheless, permitted the Government to assert on appeal a theory of guilt based solely on the sale by the petitioner of a small quantity of lead wash which it now asserted was proved on the trial to be in violation of Section 2551-a of the Internal Revenue Code.

The Circuit Court *presumed* the illegal nature of the conspiracy without first *determining* that an illegal plan existed. It failed to determine, moreover, whether, if this conspiracy had been tried separately under the original theory of the Government, a verdict of guilt could be sustained. The problem is further complicated by the fact that it is impossible to determine whether the Government would have tried this single conspiracy on the theory that it asserted on appeal, or whether it would have tried

the petitioner on the original theory. The Circuit Court therefore erred in either refusing or failing to discuss this question and to decide it.

It is respectfully submitted that it was a violation of the Due Process Clause to deprive the petitioner of his liberty by permitting the United States Government to frame an indictment in vague, obscure, and general terms, purporting to allege one conspiracy, but in reality alleging three separate conspiracies; by not informing him of the precise nature of the crime with which he was charged; by not having the issues at the trial clearly defined; by confronting him on appeal with an entirely different theory of guilt—which is tantamount to a trial without a Jury; and by the Circuit Court's refusal to clarify and decide the sufficiency of the Government's proof with respect to this concededly separate and distinct conspiracy.

B. *The Trial Judge's Conduct Throughout the Course of the Trial and the United States Attorney's Prejudicial Comments.*

The Court has recently said that the guaranty of due process is not formulated in a set of hard and fast rules but that "Asserted denial is to be decided by an appraisal of the totality of facts in a given case." (*Betts* v. *Brady*, 316 U. S. 455, 462.) Despite the standard recognized by this Court, the record in this case discloses a conviction which was the result of a trial conducted in a manner highly prejudicial to the fundamental guarantees which underlie our judicial system.

Throughout the trial lasting a number of days, the District Judge was quite evidently convinced of the guilt of the accused and took no pains to avoid disclosure of this fact to the Jury. In his examination and cross-examination of witnesses, in remarks in the presence of the Jury, in opinions expressed as to other elements of testi-

mony and the frequent reiteration of certain questions, the trial Judge departed from that attitude of disinterestedness which is regarded as the very foundation of a fair and impartial trial. This petition would be unnecessarily lengthened by quotations from the record of the Trial Judge's animatedly prejudicial conduct.

For instances where the Trial Judge ridiculed the defense counsel, failed to accord them the respect to which they were entitled as members of the Bar, and implicitly threatened them with contempt, pre-disposing the Jury unfavorably toward the petitioners, see: R. 54, 79-80, 89, 232, 109-110, 247-249, 356, 378, 540-541, 505, 556-557, 570-571.

There are many instances in the record where the Trial Court manifested an apparent desire to assist the prosecution and to put into the mouths of the witnesses words which were unfavorable to the petitioner's case. Examples of this appear at R. 274-275, 314, 347, 354-355, 442, 443, 491, 268-269.

The Court's insistent efforts to connect the defendants in a conspiracy, its frequent and unnecessary interruptions of both direct and cross-examinations that were being competently conducted, all conveyed to the jury the impression that the Court was insisting upon a conviction. See R. 338, 460, 496, 165, 169, 160-162, 164, 167, 168, 170, 171, 172-173, 174, 259, 270-1, 311, 343-4, 346, 362, 363, 374, 375, 379, 448, 455, 457, 471, 478, 535, 536, 546, 547, 552-3 and 565.

The Court, in many instances failed to safeguard the rights of the defendants, by ignoring the objections made by counsel and failing to rule on the propriety of the questions asked by the United States Attorney. See R. 203, 206, 455-456.

The unfavorable impression undoubtedly left upon the jury by the Court's obvious prejudice was intensified by the United States Attorney's indulgence in bits of sar-

casm, as to which the Court neglected to reprimand him as it never failed to do in the case of defense counsel. See R. 353-7, 206, 247, 535.

In his summation, the United States Attorney made some comment, which is not revealed in the record, upon the fact that some of the defendants produced evidence of good reputation, *whereas others, including this petitioner,* did not. Upon objections being made the following colloquy took place (R. 777-778):

> "Mr. Butler: I hate at this time to interrupt Mr. Cannella, but that is the third time he has talked about the obligations of the defense.
>
> The Court: He did not say there is any obligation. There is not any obligation.
>
> Mr. Butler: He insinuated that we should produce character witnesses.
>
> The Court: Oh, no, not at all.
>
> Mr. Butler: That is the third time, your Honor, he said it, and I think you should instruct the jury that we are under no obligation to produce any witnesses whatsoever.
>
> The Court: No; but when you put in a defense you can call character witnesses if you wish. You are not obligated. Of course not.
>
> Mr. Butler: Your Honor knows that no one can comment on the failure to put in defense.
>
> The Court: No one is commenting on the failure to put in a defense. He is referring to these defendants who took the stand only, and those are the only ones he is referring to.
>
> Mr. Butler: He specifically referred to it. He said one defendant produced a character witness and the others did not.
>
> The Court: There was no reference to any defendant who did not take the stand.

Mr. Butler: Your Honor, may I read for the record exactly——

The Court: There has been no reference to any defendants who did not take the stand.

Mr. Butler: May I read his exact words?

The Court: Do not interrupt. You can refer to it later.

Mr. Butler: He said the only character witness called——

The Court: Do not interrupt. You may reserve that for later."

It is quite evident that the Court completely misunderstood the point being made by counsel. The least that the Trial Judge could have done was to instruct the jury with respect to the legal presumption of innocence enjoyed by each of the defendants, and that their failure to produce evidence in proof of their good character in no way reflected upon their guilt.

It is respectfully submitted that the United States Attorney's comment was highly prejudicial, and that the Court's failure to eradicate the unfavorable impression created on the jury not only by the United States Attorney's remarks but by the Court's supporting them was error.

Petitioner bases this application and the proposed appeal to this Court upon the vehement contention that the prosecutor, assisted and encouraged by the trial judge conducted the entire proceeding in a manner designed to and resulting in a mandate to the jury to convict this petitioner, all in violation of petitioner's right to a fair trial under the Due Process Clause of the Fifth Amendment to the Constitution.

IV.

Petitioner's sales of lead wash, even though he may have suspected that it might be put to illegal use, is insufficient ground on which to sustain a verdict of guilt.

The gist of the offense of conspiracy as defined by Section 37 of the Criminal Code, 18 U. S. C., Section 88, is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. The record fails to reveal any evidence tying this petitioner up with any agreement to commit an offense. All that the evidence shows is that petitioner sold a quantity of lead wash to one of the other defendants and that he was apprehensive as to the legality of such sales and sought to determine whether such sales were legal. The Circuit Court in the majority opinion held that it was a fair inference that petitioner must have at least suspected, in view of the highly regulated character of the industry, that there was something unlawful about it.

Petitioner contends that suspicion on his part that lead wash sold might be used for an illegal purpose was not sufficient to prove that he made himself a part of an illegal plan to commit an offense or to defraud the United States.

Under the holding in *U. S.* v. *Falcone*, 311 U. S. 205, before one can be found guilty of being a co-conspirator, it must be shown that he knew of the existence of the conspiracy and intended to make himself a part of it. Mere knowledge that goods which he sells may be put to an illegal use is insufficient.

It is respectfully submitted that the Circuit Court's inference of petitioner's guilt is entirely unjustified and

that such a holding seriously affects the judicial administration of criminal law and materially prejudices the trial of a defendant.

Conclusion.

It is respectfully submitted that the questions raised in this case are of sufficient importance to request this Court to issue a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review its decision made herein.

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Counsel for Petitioner.